STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2005
v	No. 252766 Wayne Circuit Court
ASHLEY MARIE KUJIK, Defendant-Appellant.	LC No. 03-009100-01

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right her conviction following a jury trial of witness intimidation, MCL 750.122(8) (retaliation). She was sentenced to three years' probation, with the first thirty days to be served in jail. This case arose after defendant's friend Amanda Barnes claimed that defendant threatened and coerced her into recanting her statement, which implicated defendant in the vandalism of several cars in the school parking lot. We reverse.

Defendant first argues that the court improperly instructed the jury that MCL 750.122(8) applied regardless whether an official proceeding had actually taken place. We agree.

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions must be read as a whole rather than extracted piecemeal to create error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002), citing *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Instructional error is not harmless if it undermines the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). To determine whether the instruction undermined the reliability in the instant case, we must interpret the language of the statute in question. Statutory interpretation is an issue of law that is reviewed de novo. *Id.* at 471. MCL 750.122(8) states:

> (8) A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000, or both. As used in this subsection, "retaliate" means to do any of the following:

(a) Commit or attempt to commit a crime against any person.

(b) Threaten to kill or injure any person or threaten to cause property damage.

The goal of statutory interpretation is to find and effectuate legislative intent. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). The first step in discovering legislative intent is to look at the specific language of the statute. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). When the language of the statute is clear, judicial construction is not permitted. *Weeder, supra* at 497. The plain language of MCL 750.122(8) requires the prosecutor to prove (a) that the defendant either retaliated, attempted to retaliate, or threatened to retaliate against a person, (b) for *having been* a witness in an official proceeding. The Legislature is presumed to be aware of the rules of grammar. *People v Beardsley*, 263 Mich App 408, 412-413; 688 NW2d 304 (2004). The word "been" is the past participle of the verb "to be." William A. Sabin, *The Gregg Reference Manual* (New York: Glencoe McGraw-Hill, 9th ed, 2001), §1030, p 245. When used in connection with the verb "have," it forms the present perfect tense. *Id.* at §1033, p 247. The present perfect tense "indicates action that was started in the past and has recently been completed or is continuing up to the present time." *Id.* Thus, the prosecutor was required to prove that Barnes was already a witness before defendant could have been found guilty of MCL 750.122(8).

The challenged instruction given by the court – that MCL 750.122(8) applied regardless whether an official proceeding had taken place – generally complied with MCL 750.122(9), which states:

(9) This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding *if the person knows* or has reason to know the other person *could be* a witness at any official proceeding.

However, MCL 750.122(9) does not apply to MCL 750.122(8), because a person who *could be* a witness is not necessarily a person *having been* a witness. It could be argued that MCL 750.122(9) does apply to MCL 750.122(8) because "threatens to retaliate against another person for having been a witness in an official proceeding" can refer to the witness' status not at the time the threat is communicated, but at the future time when the threat will be carried out. It is true that the word "threaten" can indicate an impending act. See *Random House Webster's College Dictionary* (2001), p 1362. Were it not for MCL 750.122(3), we might have agreed. However, statutory provisions must be read in harmony with other provisions pertaining to the same subject or sharing a common purpose. *People v Izarraras-Placante*, 246 Mich App 490, 498; 633 NW2d 18 (2001). MCL 750.122(3) states:

(3) A person shall not do any of the following by threat or intimidation:

(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.

(b) Influence or attempt to influence testimony at a present or future official proceeding.

(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.

The plain language of MCL 750.122(3) prohibits tampering with present or future witness testimony by use of threats or intimidation, while MCL 750.122(8) does not contain the "present or future" language. We construe the omission of "present or future" from MCL 750.122(8) as intentional. See *People v Rahilly*, 247 Mich App 108, 112; 635 NW2d 227 (2001). Our interpretation is in accord with this Court's interpretation in *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003):

> In the most general sense, the Legislature identified four different categories of witness tampering: bribery (subsection 1), threats or intimidation (subsection 3), interference (subsection 6), and retaliation (subsection 8). That the Legislature chose *not* to place all these different types of tampering in the same subsection suggests that the Legislature considered them to be distinct.

To construe MCL 750.122(8) in the manner suggested by our colleague would blur the distinction found by this Court in *Green, supra* and nullify much of MCL 750.122(3). And nullification of a part of a statute should be avoided if possible. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). Our interpretation does not, however, nullify the portion of 750.122(8) referring to threats; instead, it limits the context to threats made after the witness testifies, which is in keeping with the plain language of the provision.

Because the court's instruction permitted the jury to find defendant guilty of an offense without finding that the prosecutor established an element of the offense, and the prosecutor did not establish the element of the offense, the instruction was outcome determinative and was not harmless error. Moreover, because the prosecutor did not establish an element of the offense, the jury's verdict was based on insufficient evidence, and defendant may not be retried for a violation of MCL 750.122(8). See *People v Watson*, 245 Mich App 572, 596; 629 NW2d 411 (2001). Nevertheless, a conviction may be entered with respect to a necessarily included lesser offense, *People v Bearss*, 463 Mich 623, 631-633; 625 NW2d 10 (2001), or defendant may be re-tried for a different offense, *Watson, supra* at 600-601.

Because we find that MCL 750.122(9) does not apply to MCL 750.122(8), we need not address defendant's contention that interaction between the two subsections renders MCL 750.122(8) void for vagueness.

Reversed.

/s/ Donald S. Owens
/s/ Christopher M. Murray